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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1622

WHDH, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, GREATER BOSTON TELEVISION CORPORATION, GREATER BOSTON TV CO., INC., CHARLES RIVER CIVIC TELEVISION, INC., AND BOSTON BROADCASTERS, INC., *Respondents*

No. 1708

CHARLES RIVER CIVIC TELEVISION, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, GREATER BOSTON TELEVISION CORPORATION, GREATER BOSTON TV CO., INC., BOSTON BROADCASTERS, INC., WHDH, INC., *Respondents*

No. 1716

GREATER BOSTON TELEVISION CORPORATION, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, WHDH, INC., *Respondents*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT BOSTON BROADCASTERS, INC. IN OPPOSITION

QUESTIONS PRESENTED

Following administrative proceedings originally commenced in 1954 to select a licensee to operate a tele-

vision station on Channel 5 in Boston, WHDH, Inc., received a construction permit in 1957 and began broadcasting that year, continuing to the present time. The construction permit was later set aside by the Commission because of the discovery in 1958 (while an appeal from the Commission's decision was pending in the Court of Appeals) of *ex parte* contacts occurring in 1955 and 1956 between WHDH's President, Robert Choate, and the then FCC Chairman, while WHDH's application was in an adjudicatory posture before the Commission. WHDH has been operating the station since 1957 under a series of temporary authorizations and a license limited to four months because of the "inroads made by WHDH upon the rules governing fair and orderly adjudication." (App. D-4, p. 331a) In response to an invitation by the Commission, respondent BBI and others filed new applications in 1963 and, in January 1969, after protracted hearings, the Commission granted the application of BBI and denied the others. (App. D-1, p. 52a) The Court of Appeals sustained the Commission's decision in all respects. (App. A, p. 1a)

The question presented in the three petitions for certiorari filed by the unsuccessful applicants are:

No. 1622 (WHDH, Inc., Petitioner)

1. Whether the Commission and the court below were justified in using the "tainted overtures" of Petitioner WHDH and the resulting "inroads made by WHDH upon the rules governing fair and orderly adjudication" as a reason for treating its application for renewal of license as *sui generis,* and requiring it to undergo a full comparative

hearing with new applicants for the facility, rather than as a conventional licensee seeking renewal.

2. Whether the court below failed to judge the Commission's decision solely upon the grounds which the record discloses were invoked by the agency.

No. 1708 (Charles River Civic Television, Inc., Petitioner)

1. Whether the court below erred in declining to hold invalid a 3-1 decision of the seven-member Commission in favor of BBI where (a) the dissenting Commissioner voted to renew the WHDH license, two Commissioners joined in the published Decision in favor of BBI and the fourth Commissioner concurred because he deemed his "participation . . . necessary to constitute a working majority for decision" and (b) in disposing of a petition for rehearing filed by Charles River raising the quorum question, the fourth Commissioner joined in a denial of the petition without reservation.

2. Whether the court below erred in affirming the Commission's Decision granting BBI's application, despite a "slight demerit" assigned to BBI by the Commission because of insufficient substantiation of its program proposal.

No. 1716 (Greater Boston Television Corporation, Petitioner)

1. Whether the court below adequately reviewed and disposed of the Commission's 1962 Decision denying the application of Greater Boston Television Corporation.

STATEMENT

Respondent BBI adopts the Statement of the case set forth in the Brief of the Respondent Federal Communications Commission.

ARGUMENT

Apart from the other clear and compelling reasons for denying the writ, two considerations seem to us to be overriding: (1) the extraordinary longevity of this litigation, and (2) the meticulous care and concern manifested by the Court of Appeals that every contention advanced by the parties, no matter how insubstantial, be fully considered and determined in order that this litigation be brought to an early and definitive conclusion. "Some time litigation must come to an end." (App. H7). These were the words of the Court of Appeals in its opinion of April 15, 1971, denying WHDH's motion to remand. The Court also said:

> "This case has gone to a ruling. Rehearing has been denied. We could have terminated our stay forthwith, since it was granted to a party we ruled against on the merits. We continued the stay on condition a petition for certiorari was filed within 60 days from the denial of rehearing. Our assumption was that this would permit Supreme Court disposition this Term." (App. H7)

After seventeen years of litigation the Federal Communications Commission has been fully sustained by the Court of Appeals in its final resolution of the question of which of the various competing applicants should be awarded a license to operate a Channel 5 television station in Boston. None of the petitions for *certiorari* filed by the three unsuccessful applicants presents any grounds for Supreme Court review or further prolongation of these proceedings.

This case presents none of the grounds customarily relied upon in an application for review of a federal agency action. No general question of statutory interpretation is involved. No conflict of decisions can be alleged. No issue of federal law of substantial importance is presented which has not been, but should be, settled by this Court. It is not claimed that the court below has decided a federal question in a manner conflicting with an applicable decision of this Court. Rather, WHDH relies on the uniqueness of the case to invoke the clause in Rule 19 of this Court dealing with an action of a lower court which "so far departed from the accepted and usual course of proceedings . . . as to call for an exercise of this Court's power of supervision." Consideration of the facts and the law will quickly demonstrate, however, that few less likely candidates have ever been presented to this Court for *certiorari* on this or on any other ground.

I. THE WHDH PETITION (CASE NO. 1622)

At page 27 of its petition, WHDH states that "this is indeed a unique case". In its Conclusion it says:

> "This case cannot fairly be characterized other than as a blot on, and a grievous injury to, the administrative process."

BBI agrees with both of these observations, although for reasons at substantial variance from those advanced by WHDH.

This case is unique because WHDH is the only applicant-permittee of a television station found by the Commission to have been guilty of tampering with its administrative processes which was nevertheless permitted to compete with new applicants on an equal

basis in a reopened proceeding,[1] and to continue to operate the facility at issue during such further proceedings.[2]

The case is a blot on the administrative process because of the length of time it has taken to vindicate the public interest after it was established that WHDH had sought, off the record, to influence a Commission decision. This case has achieved a unique place in the annals of administrative law for the inordinate length of time consumed by the proceedings. Nearly thirteen years have passed since the Court of Appeals for the District of Columbia Circuit was informed of testimony before the Legislative Oversight Committee of the House of Representatives concerning *ex parte* approaches by WHDH, Inc., to the then-Chairman of the Commission. It is over ten years since the Commission unanimously found that such approaches occurred and were designed to influence the Commission outside the recognized processes of adjudication. It is nearly nine years (three regular television license terms) since WHDH received its bobtail "four-month license".

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[1] In the Miami Channel 10 and Channel 7 cases, every applicant guilty of *ex parte* conduct, whether resulting in actual contact with a Commissioner or not, was disqualified. See *WKAT, Inc.* v. *F.C.C.*, 258 F. 2d 418 (D.C. Cir., 1958); *Biscayne Television Corp.*, 31 FCC 237 (1961). See also *South Florida Television Corp.* v. *F.C.C.*, 349 F. 2d 971 (D.C. Cir., 1965); *Community Broadcasting Corporation* v. *F.C.C.*, 363 F. 2d 717 (D.C. Cir., 1966).

[2] In the Jacksonville and Orlando proceedings, where *ex parte* activities were shown to have occurred in the original proceedings, but not on behalf of the winning applicants, the Court of Appeals nonetheless directed further proceedings on a new record, and required that the interim operation of the station be by a group composed of all new applicants; see *Community First Corporation* v. *F.C.C.*, 403 F. 2d 578 (D.C. Cir., 1968); *Consolidated Nine, Inc.* v. *F.C.C.*, 403 F. 2d 585 (D.C. Cir., 1968).

A.

The Commission's Treatment of WHDH as Not Being an Ordinary Renewal Applicant Was Fully Justified.

The foundation upon which all of WHDH's arguments rest is that it is a "regular renewal applicant" entitled to certain benefits which it has not received. WHDH persists in this argument despite the fact that the Hearing Examiner found, without exception by WHDH, that it did not have such status, and the Commission clearly reached the same result as the Examiner.

In paragraph 729 of his Initial Decision, Examiner Sharfman defined WHDH's status as follows:

> "729. Only superficially ambiguous is WHDH's position. On examination the ambiguity disappears. In approving WHDH's application for a short term only, the Commission neither blessed nor irrevocably condemned it, but allowed it to live, knowing that its Mayfly's term would be extended by operation of the APA's section 9, section 307(d) of the Communications Act, and rule 1.62, pending final decision after hearing on its application. The Commission, by its actions, defined the nature of WHDH's tenure. It is not an occupant under an ordinary authorization, but one who was expected shortly to justify its claim to continued existence. All licensees are subject to the possibility that someone may try for their places, but as Commission records show, the likelihood of a contest between an incumbent and another is small; in the present case, however, it did not take unusual prescience to forecast the filing of competing applications for the WHDH channel. In this inevitable contest it could not have been the Commission's expectation that WHDH would be entitled to assert competitive advantages merely because it is a renewing licensee; nor can Hearst

and Wabash Valley be regarded as supporting any such claim, if WHDH meant to advance it by its citation of these cases (par. 721, above)." (App. D-2, pp. 274a-275a)

WHDH did not take exception to this description of its status.

In its May 20, 1969 Opinion and Order disposing of Petitions for Rehearing of its January 22, 1969 Decision the Commission stated:

> "40. In closing, we think it should be made clear that our decision herein differs in significant respects from the ordinary situation of new applicants contesting with an applicant for renewal of license, whose authority to operate has run one or more regular license periods of 3 years. Thus, although WHDH has operated station WHDH-TV for nearly 12 years, that operation has been conducted for the most part under various temporary authorizations while its right to operate for a regular 3-year period has been under challenge. Not until late September 1962 did WHDH receive a license to operate its television station, and even then its license was issued for a period of 4 months only because of the Commission's concern with the '. . . inroads made by WHDH upon the rules governing fair and orderly adjudication . . . .' Again, unlike the usual situation when an applicant files for renewal of license, after WHDH filed its renewal application we issued an order directing that new applications for Channel 5 would be accepted within a specified 2-month period. Such applications were filed, accepted, and entered into the proceeding herein. Those unique events and procedures, we believe, place WHDH in a substantially different posture from the conventional applicant for renewal of broadcast license." (App. D-3, p. 322a)

The court below agreed with the Commission (App. A, pp. 21a-26a), and disposed of WHDH's argument in the following terms:

> "WHDH insists, however, on an approach which would give it all the rights and expectancies of an ordinary renewal applicant. In the ordinary case such expectancies are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest, that may not be devoted by a licensee without reasonable security. This position does not fairly characterize the situation of a licensee which, by virtue of its officer's impropriety, has been given only temporary operating authority of one kind or another (including the 4-month license). This was the conclusion of both the Hearing Examiner and the Commission (as refined on reconsideration), and we think it within the range of reasonable discretion." (App. A, p. 33a)

WHDH (pp. 13-14) relies on the Commission's 1970 *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants* (App. F), and seeks to distinguish the exception in that *Policy Statement* for "those unusual cases, generally involving court remands, in which a renewal applicant is for *sui generis* reasons to be treated as a new applicant." (App. F, p. 379a). The language of the exception is tailor-made to fit this case: Indeed, on the very day of the *Renewal Policy Statement's* adoption, the Commission in a related action expressly noted that "the WHDH case was not the usual comparative renewal case but rather was of a *sui generis* nature . . . ." *BEST, et al.*, 21 FCC 2d 355 (1970).

The simple fact is that this has been a unique case since Mr. Choate's contacts with FCC Chairman Mc-

Connaughey were first publicly disclosed in 1958. It has continued to be a unique case ever since. In support of its argument that it has been the victim of a discriminatory injustice, WHDH readily concedes that this is a unique case, and asserts that "this case can never recur". But the fact is that it can recur, and it will, whenever an applicant before an administrative agency is found to have tampered with its processes. The likelihood of its recurrence depends in substantial measure upon the willingness of the agencies and the Courts to deal with such attempts quickly and effectively.

In claiming that it "stands as the only licensee with a valid existing license that has ever been given comparative consideration under the criteria reserved for initial applicants in the Commission's entire history" (p. 17), WHDH has overlooked some fairly recent history. Four month licensees other than WHDH have been required to undergo comparative hearings before the Commission without the benefit of any special status as a licensee seeking renewal. Indeed, in these other cases these special licensees (unlike WHDH) had engaged in no wrongdoing, but had received abbreviated licenses only because the wrongful conduct of other earlier competitors had left them as the sole qualified applicants: *L. B. Wilson, Inc.*, 37 FCC 511 (1964), aff'd. *sub nom. South Florida Television Corp.* v. *F.C.C.*, 349 F.2d 971 (D.C. Cir., 1965), *cert. den.* 382 U.S. 987 (1966); *Sunbeam Television Corporation*, 38 FCC 805 (1965), aff'd. *sub nom. Community Broadcasting Corporation* v. *FCC*, 363 F.2d 717 (D.C. Cir., 1966). The *Wilson* and *Sunbeam* proceedings, like this one, had their inception in the *ex parte* disclosures of the late 1950's. *Wilson* and *Sun-*

beam were the surviving unblemished applicants for Miami Channels 10 and 7, respectively, and each was awarded a license limited to four months, in order to afford an opportunity for new applicants to come forward. Following further comparative hearings, the Commission renewed the *Sunbeam* and *Wilson* licenses, but only because each had established its superiority over the new, competing applicants under the Commission's standard comparative criteria, and not because either was entitled to special consideration merely because it was an applicant seeking renewal of license. It becomes apparent that solid precedents support the treatment accorded WHDH.

B.

WHDH Has Had Full Judicial Review of Its Arguments.

Obviously as an afterthought, WHDH argues that the action of the Commission in limiting WHDH to a 4-month license was based upon a factual record that was never the subject of judicial review (p. 24). The record shows otherwise, however, for the Commission's Findings and Conclusions, based on the special hearing before Judge Stern, were confirmed and adopted in the Commission's September 25, 1962 decision (App. D-3, p. 327a). WHDH appealed from that order in 1963 (D.C. Cir. No. 17,788), and consideration of that interrupted case was consolidated with the appeals from the Commission's 1969 grant to BBI. In the opinion below, nine pages (App. A, pp. 17a-35a) are devoted to the findings, reasoning and conclusions of the July 1960 decision of the Commission and of the November 1960 Report to the court below and to the remedial measures the Commission adopted in the light of such conclusions. Noting that

the Commission had taken a different view of Choate's conduct than Judge Stern, the Court held: "The Commission was within the range of its discretion when it found misconduct"; "when it decided to take remedial measures"; and "when it adopted, as successive remedial measures, voiding the original grant to WHDH . . . , remanding for a comparative reevaluation of the original applicants; confining the grant to WHDH . . . to a mere 4-month operating license; providing for a reopening period of two months in order to permit a comparative evaluation with new applicants proposing to serve the public interest." (App. A, p. 30a).[3] Clearly, WHDH has had its review.

C.

In Its Review of the Commission's Decision the Court Below Followed the Chenery Doctrine Scrupulously.

Notwithstanding the clear language of paragraph 40 of the Commission's May 20, 1969 Memorandum Opinion and of its decision in *BEST, supra,* Petitioner WHDH insists that the Court below fashioned an original basis of support for the Commission's conclusions which was not even suggested in the agency's pronouncements.

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[3] The frivolous nature of WHDH's argument is revealed by its suggestion that, in referring to the Commission's July 1960 Decision rather than its November 1960 Report and Recommendation, the Court below reviewed the wrong document (p. 24). The facts are as stated in an interlocutory order of the Commission adopted May 24, 1961:

> "The United States Court of Appeals for the District of Columbia Circuit has approved the Commission's Report and Recommendation, *which document embodied the findings and conclusions contained in the Commission's Decision of July 14, 1960. . . . (WHDH, Inc.,* 20 Pike and Fischer Radio Regulation 410e) (emphasis supplied.)

No more answer to Petitioner's *Chenery*[4] argument would appear to be required than what is found in the four corners of the opinion below. The Court's review of and reliance upon the findings with reference to Mr. Choate's *ex parte* approaches were fully set forth (App. A, pp. 27a-30a). Its study of and dependence upon the Commission's analysis of the unique nature of the renewal application here in issue, were clearly stated (App. A, pp. 22a-26a). In a word, the record leaves no room for doubt that it was the Commission and not the Court of Appeals which supplied the rationale of the decision in this case.

II. THE CHARLES RIVER PETITION (CASE NO. 1708)

A.

The Court Below Correctly Held That the Commission's Decision Was Supported by a Majority of a Quorum.

The no-quorum and no-majority-of-a-quorum argument of Petitioner Charles River was made below and characterized by the Court as "a subtle, technical contention which is deftly stated" (App. A, p. 39a). The Court below disposed of the point in the following language:

> "The short answer is that four out of seven Commissioners constitutes a quorum; that the Commission may act, assuming a quorum of four or more, by the vote of a majority of those present; and that in this docket out of the four Commissioners casting votes three Commissioners cast their vote in favor of an award to BBI.

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[4] *Securities & Exchange Commission* v. *Chenery*, 318 U.S. 80 (1943) and 332 U.S. 194 (1947).

> Even assuming that Commissioner Johnson voted for BBI solely in order to avoid an impasse and to provide an effective order, that is a perfectly sound reason for his vote, and one that involves neither stultification nor irrationality. Government often involves the choice of the feasible, and the selection of the least undesirable alternative. It is accepted judicial practice for a judge to cast a vote, at least assuming no violation of conscience is involved, in order to avoid an impasse and secure a legally effective mandate for the court. We also note that when this point was raised in the application of Charles River for reconsideration, Commissioner Johnson expressed no reservation in voting to deny that application and uphold the grant to BBI." (App. A, pp. 39a-40a) (footnotes omitted)

In his opinion, C mmissioner Johnson said ". . . my participation is necessary to constitute a working majority for decision. Accordingly, I concur in today's decision" (App. D-1, p. 78a). This makes it clear beyond doubt that Charles River's contentions to the contrary notwithstanding, he was concurring, not abstaining, and he was agreeing with, not rejecting the rationale of Commissioners Bartley and Wadsworth. Commissioner Johnson's unreserved joinder in the rejection of Charles River's petition for rehearing raising the no-quorum point (App. D-3, pp. 316a, 317a, par. 25) is conclusive confirmation that a majority of a quorum voted for BBI.[5]

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[5] It is true that in passing on the petition for rehearing, the Commission did not expressly deal with the no-majority-of-a-quorum argument, as asserted by Petitioner Charles River (p. 15). But that fact can give Petitioner little comfort since the reason the argument was not considered is that it was never made by Charles River before the Commission, at least in any understandable form, and, therefore, on familiar principles should not even be open here.

B.

There Was No Error by the Commission or the Court Below in Declining To Attribute General Unreliability to BBI Because It Was Assigned a "Slight Demerit Because of Its Insufficiently Supported Local Live Program Proposal".

In Section B of its Argument, Petitioner Charles River (pp. 15-17) attempts unsuccessfully to balance its whole case on the point of a needle. The entire claim there made of "a serious defect in the substantive aspects of the Commission's decision making process" (p. 15) rests completely on a finding of the Examiner, asserted by Petitioner to have been accepted by the Commission, that BBI's local programming proposal had been "flashed for its supposed value in a comparison" (p. 16). It is true that the Examiner found that BBI's large amount of proposed local live programming "intensifies the suspicion that BBI's figure . . . was flashed for its supposed value in a comparison" (App. D-2, p. 288a, par. 762). It is also true, however, that BBI excepted to this conclusion in its Exception 138, as follows:

> "138. To Paragraph 762, insofar as it infers that the BBI proposal for local live programming 'was flashed for its supposed value in a comparison' as a wholly unwarranted and unsupported conclusion."

This exception was granted by the Commission in the following language:

> "Exception No. 138. Granted and the complained of phrase in par. 762 of the examiner's initial decision is deleted." (App. D-1; p. 73a).

With the removal of what was already fragile support for a shaky argument, the entire structure of Section B collapses. All that is left is the assessment by

the Commission of a slight demerit to BBI because of its insufficiently supported local live programming proposal (App. D-1; par. 39, p. 67a), held by the Commission to be "offsetting" against a slight demerit assessed against Charles River (App. D-1, pp. 67a-68a). This was quite properly held by the court below as far short of a character defect which might vitiate the BBI application (App. A, p. 40a).

In any event, this question is entirely factual in nature, depends upon an evaluation of the record, and clearly does not warrant further review by this Court.

III. GREATER BOSTON'S PETITION (CASE NO. 1716)

A.

There Was No Error by the Commission or the Court Below in Their Treatment in 1969 and 1970, Respectively, of Contentions of Greater Boston I Attacking the Validity of the Grant of a Four-Month License to WHDH in 1962.

Greater Boston I rests its petition on the contention that, in the procedural maze of these consolidated cases, the application of Greater Boston I became lost in the shuffle of court review. The fact is that it was the *applicant,* not the *application,* which became lost, as an examination of its schizophrenic history will quickly establish. Moreover, the Opinion of the court below makes it plain that Greater Boston I's contentions were fully considered, even though, because of their lack of merit, their disposition required little space.

Petitioner Greater Boston Television Corporation (Greater Boston I) was incorporated in 1952 (p. 5) and filed its application to operate on Channel 5 in Boston in 1953. It is from the lower court's affirmance of the Commission's 1962 denial of that application that it is now seeking review. In 1963, Greater

Boston TV Co., Inc. (Greater Boston II) was incorporated and it filed its application to operate on Boston Channel 5 in March of that year, responding to the same invitation which beckoned BBI and Charles River. Of the 36 stockholders of Greater Boston I, two had died and 4 others had moved far away from Boston; the remaining 30 were invited to participate and 26 accepted in addition to 14 newcomer invitees (App. D-2; par. 200, p. 138a). Because of the substantial identity in ownership of the two corporations, it was necessary for Greater Boston II to obtain a waiver of the Commission's Rules against repetitious applications. (App. D-2, p. 81a, par. 1; p. 142a, par. 218) The rationale of the Commission in granting the waiver obviously was to permit the principals of Greater Boston I to update their showing to the Commission so that they might compete with WHDH on a fresh rather than a stale record. (App. D-1, p. 53a, Fn. 3) From the subsequent conduct of the Greater Boston principals, it appears that *their* rationale in seeking the waiver was the exact opposite of the Commission's. Their preparation for the new proceeding began and ended with the formation of a new corporation. Instead of updating their presentation to the Commission, they defaulted so completely before the Examiner that Greater Boston II was disqualified even from comparative consideration (App. D, pp. 57a, 70a). Although Greater Boston II noted an appeal from the disqualification, its brief was rejected as in violation of court rules. Now in the guise of Greater Boston I, essentially the same principals come before this Court claiming minimal connection with Greater Boston II and with its collapse in the second proceeding. Their goal is to attempt by some alchemy to convert their corporate veils into iron curtains, in disregard of the fact

that the record was closed on their comparative case over fifteen years ago.

Jointly or severally the Greater Boston applicants are anachronisms, without legal support for their position. Although Greater Boston II has not petitioned for *certiorari,* the aroma of its presentation still surrounds Greater Boston I because of the overlapping of principals. Of the five members of the Commission participating in the 1962 Decision, review of which is now sought, not a single one voted for Greater Boston I. Moreover, in reviewing that Decision, the Court below specifically referred to its reexamination of the Commission docket before it in 1963 (App. A, p. 27a). It was well aware of Petitioner's argument that WHDH should be absolutely disqualified because of Mr. Choate's *ex parte* activities (App. A, p. 32a). Indeed, the final words in its Opinion were devoted to the primary objective of the Greater Boston principals which was to confine the Commission in the Boston Channel 5 case to consideration limited to the original record made in the 1950s. (App. A, p. 43a, Fn. 44)

It becomes clear that not only has Petitioner had its day (in fact, years) in court, but that no party except WHDH has had more chances to gain the right to operate on Channel 5 than the Greater Boston principals. For them no less than for WHDH, all good things must end.

IV.

CONCLUSION

Since 1957, WHDH has buttressed its influence over the Boston area by adding the power of a television station to that of a 50,000 watt AM station, a full power FM station and its newspapers. It has reaped large

economic benefits from its television operation. It has devised ingenious means for perpetuating this case far beyond the period that anyone but Petitioner WHDH could have dreamed possible. It appears to have an apparently inexhaustible stock of dilatory tactics in mind to postpone the inevitable day its television station will go off the air.[6]

When this case came before the Court of Appeals in 1970, it presented a tangled skein, procedurally and substantively, complicated by the series of appeals, remands and consolidations, which all derived from the "violence to the integrity of the Commission's processes" done by WHDH's improper *ex parte* contacts. With painstaking care, in an opinion which is a model of judicial conscientiousness and scrupulous concern

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[6] Notwithstanding the expressed concern of the court below with the delays in concluding this proceeding, WHDH on March 9, 1971, filed with the court a "Motion to Remand" the proceeding to the Commission for the purpose of probing the mental processes of one of the Commissioners participating in the 1969 Decision. The Motion was denied by the court on April 15, 1971, in an order set forth at Appendix H to WHDH's Petition. Six days later, and just two days before lodging its Petition with this court, WHDH filed with the Commission a "Petition for Further Proceedings on Application of Boston Broadcasters, Inc.", in which it prays that the Commission conduct an investigation into the qualifications of BBI on the basis of "newly-discovered" evidence, some of which predates the Commission's 1969 Decision. Supporting Comments were submitted by Charles River and an extensive Opposition, by BBI. On May 18, 1971, BBI filed with the Commission a Request for Specification of Termination Date predicated in part upon the abuse of process manifested by WHDH's repeated and baseless filings in defiance of uniformly accepted concepts of administrative finality and orderly judicial review. The dilatory intent of the WHDH-Charles River filings is further confirmed by Charles River's gratuitous suggestion (p. 18, Fn. 3) that this Court postpone disposition of its own petition for *certiorari* until the Commission has acted on the matters pending before it.

for the rights of all the parties, the Court of Appeals patiently unraveled the skein and carefully considered every facet of the case. Every question now raised before this Court in each of the three petitions for *certiorari* was fully examined and correctly disposed of in the court below. We respectfully urge that, in the interest of sound judicial administration as well as preventing further unnecessary prolongation of an already far-too-long litigation, the time has come to close the books on the Channel 5 case by a prompt denial of the writs at the present term of Court.

Respectfully submitted,

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